No. _____

In the
Supreme Court of the United States

E. STEPHEN DEAN
Petitioner,

v.

THOMAS K. BYERLEY
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

E. STEPHEN DEAN
PRO SE PLAINTIFF
212 SOUTH MAIN ST.
PIEDMONT, MO 63957
(573) 429-4192

QUESTION PRESENTED

Did the United States Court of Appeals for the Sixth Circuit correctly affirm the trial court's decision to submit the "under color of state law" element to the jury in this civil rights case, when this Court has repeatedly held that a court, rather than a jury, should decide issues of law?

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is E. Stephen Dean, an individual citizen of the United States, residing in Piedmont, Missouri.

Respondent

Respondent is Thomas K. Byerley, the former Director of the State Bar of Michigan's Character and Fitness Department.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Statutes

RELIEF SOUGHT

Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The two decisions of the United States Court of Appeals for the Sixth Circuit are reported at *Dean v. Byerley*, 2005 U.S. App. LEXIS 17830, August 17, 2005, (See, **Appendix A**), and *Dean v. Byerley*, 354 F.3d 540 (6th Cir. 2004).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 17, 2004. Petitioner filed a motion for reconsideration that was denied on September 2, 2005. This petition for writ of certiorari is filed within ninety days of that date. 28 USC §2101(c). This Court has jurisdiction by virtue of 28 USC §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provision:

42 U.S.C. 1983

This Statute provides:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the

District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner E. Stephen Dean graduated from law school at age 60. Shortly thereafter, he filed this 42 USC § 1983 action alleging that Respondent Thomas K. Byerley, the (former) Director of Professional Standards of the State Bar of Michigan, violated the Petitioner's First Amendment rights when the Respondent said that the Petitioner would be denied a law license because of his picketing activities. State-law claims of assault and libel were also included, based upon the Respondent driving his motor vehicle at Petitioner twice and Respondent's publishing of false accusations of criminal conduct by the Petitioner.

In a published decision, the United States Court of Appeals for the Sixth Circuit held that Petitioner had a constitutionally protected right to engage in peaceful targeted residential picketing in the absence of a narrowly tailored and applicable time, place, or manner regulation prohibiting such picketing. *Dean v. Byerley*, 354 F.3d 540 (6th Cir. 2004). Additionally, it was held that the District Court had erred in granting summary judgment to the Respondent official on the basis that he had not acted under color of

state law. In fact, the Court of Appeals acknowledged that the Respondent had already admitted this element. *Dean, supra*, 354 F.3d at 553 ("In his answer, Byerley responded to Dean's allegation that Byerley acted under color of state law by admitting 'that Plaintiff's allegations against Defendant arise from Defendant's status as Regulation Counsel for the State Bar of Michigan.'").

The jury trial in this case began on October 20, 2004, and contrary to this Court's well-established precedent, and contrary to Respondent's admission, the District Court refused to decide the "under color of state law" issue as a matter of law. *See Blum v. Yaretsky*, 457 U.S. 991, 996-98, 102 S. Ct. 2777, 2782, 73 L. Ed. 2d 534 (1982) (describing the question of whether there is state action as question of law); *Cuyler v. Sullivan*, 446 U.S. 335, 342 n. 6, 100 S. Ct. 1708, 1715 n. 6, 64 L. Ed. 2d 333 (1980) (determining if state action exists is resolution of question of law). Rather, the District Court held that the jury would decide this element. The District Court instructed the jury as follows:

> Acts are done under color of state law -- color of law of a state, not only when state officials act within the bounds or limits of their lawful authority, but also when such officers act without and beyond the bounds of their lawful authority. The phrase "under color of state law" includes acts done under color of any state law, or county or municipal ordinance, or any regulation issued thereunder, or any state or local custom. In order for unlawful acts of an official to be done "under color of any law," the unlawful acts must be done while the official is purporting or pretending to act in the performance of the official's official duties. The unlawful acts must consist of an abuse or misuse of power possessed by the official only because the person is an official. The unlawful acts must be of such a nature and be committed under such circumstances that they would not

have occurred but for the fact that the person committing them was an official, purporting to exercise official powers. The act of a public official in pursuit of the official's personal aims that is not accomplished by virtue of the official's official authority is not action under color of state law merely because the individual happens to be a public official. If you find that the defendant was acting under color of state law, then you should proceed to the second required element of plaintiff's claim.

The above constituted the extent of the jury's instruction on the "color of state law" issue and the jury returned a verdict in favor of Respondent. When this case reached the Court of Appeals for the second time, it was held that the issue of whether there was state action was properly delegated to the jury.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Sixth Circuit incorrectly affirmed the trial court's decision to submit the "under color of state law" element to the jury in this civil rights case, since this Court has repeatedly held that a court, rather than a jury, should decide issues of law.

To prevail on a 42 U.S.C.S. § 1983 claim, a plaintiff must establish that a person acting under color of state law deprived the plaintiff of a right secured by the Constitution or laws of the United States. *Dean v. Byerley*, 354 F.3d 540, 546 (6th Cir. 2004). In concluding that the question of whether Respondent Byerley acted under color of state law should have been an issue for the jury, the District Court and the Respondent relied upon one sentence in the Sixth Circuit's prior opinion in *Dean*: "Contrary to the district court, we conclude that Dean created a genuine issue of material

fact as to whether Byerley acted under color of state law." *Id.* at 544. Once this case again reached the Court of Appeals, the Court stated:

> As Dean sees the matter, the "color of state law" inquiry is a question of law that a district judge must decide. That, however, is not invariably the case. "Although it is possible to determine . . . whether a person acted under color of state law as a matter of law, there may remain in some instances unanswered questions of fact regarding the proper characterization of the actions for the jury to decide." *Chapman v. Higbee Co.*, 319 F.3d 825, 834 (6th Cir. 2003) (en banc) (quotations omitted). In the initial decision in this action, the court decided that this was just such a case given Dean's and Byerley's divergent accounts of what happened on the morning of March 27th when Dean picketed the Byerley residence. The court therefore "conclude[d] that Dean created a genuine issue of material fact as to whether Byerley acted under color of state law." *Dean*, 354 F.3d at 544. In the aftermath of this conclusion, it was not only proper, but indeed quite necessary, for the district court to submit the "color of state law" question and the competing factual allegations surrounding it to the jury.

(Appendix A, p. 4a)

This interpretation of law, however, misses the point. Whether conduct constitutes state action is no simple question of fact. *See Blum v. Yaretsky*, 457 U.S. 991, 996-98, 102 S. Ct. 2777, 2782, 73 L. Ed. 2d 534 (1982) (describing the question of whether there is state action as question of law); *Cuyler v. Sullivan*, 446 U.S. 335, 342 n. 6, 100 S. Ct. 1708, 1715 n. 6, 64 L. Ed. 2d 333 (1980) (determining if state action exists is resolution of question of law). *See also, Almand v. DeKalb County, Georgia*, 103 F.3d 1510, 1514 (11th Cir. 1997). The question for the jury was not whether Respondent was acting under color of state law, but rather, whether Petitioner's allegations were true. The initial published

decision in *Dean* makes it abundantly clear that if Petitioner's allegations are proven as true, then a constitutional violation occurred.

Appellee even admitted that this action resulted from his governmental function, and the Court of Appeals acknowledged that fact. *Dean, supra*, 354 F.3d at 553 ("In his answer, Byerley responded to Dean's allegation that Byerley acted under color of state law by admitting "that Plaintiff's allegations against Defendant arise from Defendant's status as Regulation Counsel for the State Bar of Michigan."). With that admission, the issue should not have been submitted to the jury. The question for the jury should have been whether it believed Petitioner's version of the facts, not whether the Respondent was acting under color of state law if those facts are believed. As this Court has held: "[i]f a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action 'under color of state law' for § 1983 purposes." *Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 n.2 (2001) (citing *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 935 (1982)).

In the context of a civil rights action, whether an officer was acting under color of law is a legal issue. *Neuens v. City of Columbus*, 303 F.3d 667, 670 (6th Cir. 2002). In *Neuens*, the parties stipulated that the defendant officer acted under color of state law. The Sixth Circuit rejected this stipulation, while noting, "Issues of law are the province of courts, not of parties to a lawsuit, individuals whose legal conclusions may be tainted by self-interest." *Id.* "It is the function of the trial judge to determine the law of the case. It is impermissible to delegate that function to a jury through the submission of testimony on controlling legal principles." *United States v. Zipkin*, 729 F.2d 384, 387 (6th Cir. 1984). Here, the trial court impermissibly delegated to the jury the trial court's own duty to decide this issue. The decision of whether Respondent acted under color of state law is "an issue of law which should never have been submitted to the jury." *Jennings v. Patterson*, 488 F.2d 436, 438 (5th Cir. 1974).